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June 30, 2008

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Art Unit 2132

Commissioner for Patents PO Box 1450 Alexandria, VA 22313-1450

Re:

U.S. Utility Patent Application

Application No. 10/810,443; Filed: March 26, 2004

For: Computer Virus Screening Methods and Systems

Inventors: FRANCZEK et al. Our Ref: 2222.5230005

Sir:

Transmitted herewith for appropriate action are the following documents:

- 1. Brief on Appeal Under 37 C.F.R. §41.37;
- 2. Fee transmittal;
- 3. Credit Card Payment Form (PTO-2038) in the amount of \$510.00 to cover:

\$510 for filing a brief in support of an appeal; and

4. Return postcard.

It is respectfully requested that the attached postcard be stamped with the date of filing of these documents, and that it be returned to our courier.

In the event that extensions of time are necessary to prevent abandonment of this patent application, then such extensions of time are hereby petitioned.

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Commissioner for Patents June 30, 2008 Page 2

The U.S. Patent and Trademark Office is hereby authorized to charge any fee deficiency, or credit any overpayment, to our Deposit Account No. 19-0036.

Respectfully submitted,

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.

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Under the Paperwork Reduction Act of 1995 no persons are required to respond to a collection of information unless it displays a valid OMB control number Complete if Known Effective on 12/08/2004 Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818). Application Number 10/810.443 TRANSMIT Filing Date March 26, 2004 For FY 2008 First Named Inventor Edward J. FRANCZEK <u> 104 3</u> **Examiner Name** Almeida, Devin E. Applicant claims small entity status. See 37 CFR 1.27 Art Unit 2132 TER TRA TOTAL AMOUNT OF PAYMENT (\$) 2222.5230005 510 Attorney Docket No. METHOD OF PAYMENT (check all that apply) Check X Credit Card Money Order None Other (please identify): X Deposit Account Deposit Account Number: 19-0036 Deposit Account Name: Sterne, Kessler, Goldstein & Fox P.L.L.C. For the above-identified deposit account, the Director is hereby authorized to: (check all that apply) Charge fee(s) indicated below Charge fee(s) indicated below, except for the filing fee Charge any additional fee(s) or underpayments of fee(s) Credit any overpayments under 37 CFR 1.16 and 1.17 WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038. **FEE CALCULATION** 1. BASIC FILING, SEARCH, AND EXAMINATION FEES **EXAMINATION FEES FILING FEES** SEARCH FEES Small Entity **Small Entity** Small Entity **Application Type** Fee (\$) Fee (\$) Fees Paid (\$) Fee (\$) Fee (\$) Fee (\$) Fee (\$) Utility 310 155 510 255 210 105 210 130 Design 105 100 50 65 210 310 160 80 Plant 105 155 620 310 155 510 255 310 Reissue 210 0 Provisional 105 0 0 0 Small Entity 2. EXCESS CLAIM FEES Fee (\$) Fee (\$) Fee Description 50 25 Each claim over 20 (including Reissues) 210 105 Each independent claim over 3 (including Reissues) 370 185 Multiple dependent claims Multiple Dependent Claims **Total Claims Extra Claims** Fee Paid (\$) Fee Paid (\$) Fee (\$) HP = highest number of total claims paid for, if greater than 20. Indep. Claims Extra Claims Fee (\$) Fee Paid (\$) - 3 or HP = HP = highest number of independent claims paid for, if greater than 3. 3. APPLICATION SIZE FEE If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$260 (\$130 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s). Number of each additional 50 or fraction thereof Fee (\$) Extra Sheets **Total Sheets** (round up to a whole number) x - 100 = \_ / 50 = 4. OTHER FEE(S) Fees Paid (\$) Non-English Specification, \$130 fee (no small entity discount) 510 Other (e.g., late filing surcharge): filing a brief in support of an appeal SUBMITTED BY Registration No. Telephone (202) 371-2600 60.724 (Attorney/Agent)

Signature Date Name (Print/Type) James 9. Pohl

This collection of information it equired by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.



### IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

FRANCZEK et al.

Application No.: 10/810,443

Filed: March 26, 2004

For: Computer Virus Screening

Methods and Systems

Confirmation No.: 8971

Art Unit: 2132

Examiner: Almeida, Devin E.

Atty. Docket: 2222.5230005

Brief on Appeal Under 37 C.F.R. § 41.37

Mail Stop Appeal Brief - Patents

Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450

Sir:

A Notice of Appeal from the Final Rejection of claims 1-20 was filed on April 30, 2008. Appellants hereby file one copy of this Appeal Brief, together with the required fee set forth in 37 C.F.R. § 41.20(b)(2).

It is not believed that extensions of time are required beyond those that may otherwise be provided for in documents accompanying this paper. additional extensions of time are necessary to prevent abandonment of this application, then such extensions of time are hereby petitioned under 37 C.F.R. § 1.136(a), and any fees required therefor (including fees for net addition of claims) are hereby authorized to be charged to our Deposit Account No. 19-0036.

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## I. Real Party In Interest (37 C.F.R. § 41.37(c)(1)(i))

The real party in interest in this appeal is AUCTNYC 8, L.L.C., having its principal place of business at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. An assignment of all right, title and interest in and to the above-captioned patent application from Verve, L.L.C. to AUCTNYC 8, L.L.C. was recorded at the U.S. Patent & Trademark Office (USPTO) on March 5, 2007 at Reel 018951, Frame 0538.

# II. Related Appeals and Interferences (37 C.F.R. § 41.37(c)(1)(ii))

Appellants, including the undersigned legal representative and the assignee of the above-captioned application, are aware of no pending appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board of Patent Appeals and Interferences ("the Board") in the pending appeal.

## III. Status of Claims (37 C.F.R. § 41.37(c)(1)(iii))

The Application was filed on March 26, 2004, and was assigned U.S. Application No. 10/810,443 (herein "443 application"). The '443 application originally included claims 1-20. On March 22, 2007, the Examiner mailed a Non-final Office Action rejecting claims 1-20. The Appellants responded on September 24, 2007, by filing an Amendment and Reply Under 37 C.F.R. § 1.111, in which claims 1, 5, and 11 were amended, but no claims were canceled or added. The Examiner mailed a Final Office Action (herein "Final Office Action") rejecting claims 1-20 for a second time on November 1, 2007. On January 31, 2008, the Appellants responded by filing an Amendment and Reply Under 37 C.F.R. § 1.116, in which no claims were amended, added, or canceled. On February 20, 2008, the Examiner mailed an Advisory Action maintaining the Final Rejection of claims 1-20. On April 30, 2008, Appellants filed a Arguments to Accompany an Pre Appeal Brief Request for Review. On May 16, 2008, the Panel mailed a Notice of Panel Decision from Pre Appeal Brief Review, deciding the application should proceed to the Board of Patent Appeals and Interferences.

Claims 1-20 are on appeal. A copy of the claims on appeal can be found in the attached Claims Appendix.

# IV. Status of Amendments (37 C.F.R. § 41.37(c)(1)(iv))

No amendments to the claims have been submitted subsequent to the Final Office Action mailed November 1, 2007. All amendments to the claims previously presented during prosecution have been entered.

## V. Summary of Claimed Subject Matter (37 C.F.R. § 41.37(c)(1)(v))

Exemplary portions of the specification providing support for claimed subject matter are provided below for each of the independent claims involved in the appeal. The explanation here refers to the specification by page and line number, and to the drawings, if any, by reference characters.

# Independent claim 1 recites a method. The method includes:

receiving computer data from a first computer for transmission to a second computer via a network (see, for example, in one embodiment specification, page 5, lines 7-13; page 12, line 28 - page 13, line 24; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 8, element 420; Fig. 9, element 456; originally-filed claim 1); and

screening the computer data for at least one virus before communicating the computer data to the second computer, wherein said screening comprises creating a model of the second computer, installing a program contained in the computer data on the model, and screening the model for the at least one virus (see, for example, in one embodiment specification, page 5, line 14 - page 8, line 3; page 13, line 17 - page 14, line 5; page 18, line 9 - page 19, line 12; Fig. 4, elements 206 and 220; Fig. 5, element 212; originally-filed claim 1).

Independent claim 5 recites a virus screening device operative to be connected to a network and operative to screen computer data received from a first computer for at least one virus before communicating the computer data to a second computer. The virus screening device includes:

a model of the second computer, the model configured to have a program contained in said computer data installed thereon, and wherein said model is further configured to be screened for the at least one virus (see, for example, in one embodiment specification, page 5, line 14 - page 8, line 3; page 13, line 17 - page 14, line 5; page 18, line 9 - page 19, line 12; Fig. 4, elements 206 and 220; Fig. 5, element 212; originally-filed claim 5).

### **Independent claim 11** recites a method. The method includes:

receiving screened data from a network-based virus screening device configured to screen data for at least one virus before communicating the data to a first computer, wherein said screening of data comprises creating a model of the first computer, installing on the model a program contained in the data, and screening the model for the at least one virus (see, for example, in one embodiment specification, page 5, line 7 - page 8, line 3; page 12, line 28 - page 13, line 24; page 18, line 9 - page 19, line 12; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 4, elements 206 and 220; Fig. 5, element 212; Fig. 8, element 420; Fig. 9, element 456; originally-filed claim 11); and

forwarding the screened data to the first computer (see, for example, in one embodiment specification, page 5, lines 7-13; page 12, line 28 - page 13, line 24; page 30, lines 1-7; page 30, lines 8-22; Fig. 1, element 10; Fig. 3, elements 106 and 110; Fig. 8 - element 420; Fig. 9, element 456; originally-filed claim 11).

# VI. Grounds of Rejection to be Reviewed on Appeal (37 C.F.R. § 41.37(c)(1)(vi))

A concise statement listing the ground of rejection presented for review follows.

### A. Ground 1

Claims 1-20 were rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over U.S. Patent No. 5,623,600 to Ji *et al.* (herein "Ji") in view of U.S. Patent No. 5,440,723 to Arnold *et al.* (herein "Arnold").

### VII. Argument (37 C.F.R. § 41.37(c)(1)(vii))

- A. The Rejection of Claims 1-20 under 35 U.S.C. § 103(a) is in Error and Must be Reversed.
  - a) Claims 1-20 are Non-Obvious Because Ji Teaches Away from the Claims

The Examiner fails to establish a prima facie case of obviousness in the Final Office Action of claims 1-20 under 35 U.S.C. § 103(a) because Ji teaches away from the claims. "A prima facie case of obviousness can be rebutted if the applicant . . . can show 'that the art in any material aspect taught away' from the claimed invention." In re Geisler, 116 F.3f 1465, 1469 (Fed. Cir. 1997). "A reference may be said to teach away when a person of ordinary skill, upon reading the reference . . . would be led in a direction divergent from the path that was taken by the applicant." Tec Air, Inc. v. Denso Mfg. Mich. Inc., 192 F.3d 1353, 1360 (Fed. Cir. 1999). When determining if a cited reference teaches away, a reference should be considered as a whole, and portions arguing against or teaching away from the claimed invention must be considered. Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc., 796 F.2d 443, 230 USPQ 416 (Fed. Cir. 1986); Gillette Co. v. S.C. Johnson & Sons, Inc., 919 F.2d 720, 724, 16 USPQ2d 1923, 1927 (Fed. Cir. 1990) (stating that the closest prior art reference "would likely discourage the art worker from attempting the substitution suggested by [the inventor/patenteel"). The United States Supreme Court has also recently opined about the impact of teaching away on nonoviousness, stating in KSR Int'l. Co. v. Teleflex, Inc. "[w]hen the prior art teaches away from combining certain known elements, discovery of successful means of combining them is more likely to be nonobvious." 550 U.S., 127 S. Ct. 1727, 82 U.S.P.Q.2d 1385 (2007).

The Appellants' claims 1-20, including independent claims 1, 5, and 11, recite distinguishing features from which Ji teaches away. For example, claim 1 recites

(emphasis added) "wherein said screening comprises creating a model of the second computer, installing a program contained in the computer data on the model, and screening the model for the at least one virus," claim 5 recites (emphasis added) "a model of the second computer, the model configured to have a program contained in said computer data installed thereon, and wherein said model is further configured to be screened for the at least one virus," and claim 11 recites (emphasis added) "wherein said screening of data comprises creating a model of the first computer, installing on the model a program contained in the data, and screening the model for the at least one virus." Thus, Appellants' claims recite features that are directed towards execution at an application level.

In contrast, Ji explicitly teaches performing "all virus screening below the application level." Ji, col. 6, lns. 11-13 (Emphasis added). Ji states "[t]he present invention is particularly advantageous because all virus screening is performed below the application level." Ji, col. 6, lns. 11-13 (Emphasis added). Thus, since Ji explicitly requires operation below the application level, Ji leads the person of ordinary skill away from performing virus screening at the application level, down a divergent path from that claimed by the Appellants. Therefore, a prima facie case of obviousness is not established because Ji explicitly teaches away from the claimed feature of performing virus screening at an application level.

In the Advisory Action, the Examiner asserts that the combined teachings of Ji and Arnold suggest to those of ordinary skill in the art that the claimed features are obvious. To support this assertion, the Examiner states that a combination of Ji's device and Arnold's device "would not change the principle of operation of Ji [and] it would increase the effectiveness of the virus screener by scanning all the layers." Advisory

Action, page 2. However, the Advisory Action does not address the problem of Ji's explicit teaching away from performing virus screening at an application level, as claimed by the Appellants. Ji teaches away from the Appellants' claims, thus Ji suggests to those of ordinary skill in the art to take a path other than that claimed by the Appellants. Further, the Advisory Action does not address how combining Ji's device and Arnold's device can be accomplished without changing principles of operation of Ji and/or Arnold, as discussed in further detail below.

Therefore, Appellants respectfully request that the Board reverse the Examiner's Final Rejection of claims 1-20 under 35 U.S.C. § 103(a) and forward this application for issue.

b) Claims 1-20 are Non-obvious Because a Combination of Ji's Device and Arnold's Device Cannot be Made for Technical Difficulties as It Would Require Changing a Principle of Operation

Even assuming, which Appellants do not acquiesce to, Ji does not teach away from the claims, the Examiner fails to establish a prima facie case of obviousness in the Final Office Action of claims 1-20 under 35 U.S.C. § 103(a) because modifying or combining Ji's device with Arnold's device requires changing a principle of operation of Ji's device. It is well-settled that to establish a prima facie case of obviousness under 35 U.S.C. § 103(a), a proposed modification or proposed combination of references cannot change a principle of operation of a cited reference. According to the M.P.E.P., "[i]f the proposed modification or combination of the prior art would change the principle of operation of the prior art invention, then the teachings of the references are not sufficient to render the claims prima facie obvious." M.P.E.P. § 2143.01(VI) (citing In re Ratti, 270 F.2d 810 (CCPA 1959)). See also, 72 Fed. Reg. 57526 (V)(1) (suggesting obviousness cannot be found when "(1) one of ordinary skill in the art could not have combined the claimed elements by known methods (e.g., due to technological difficulties)") and Application of Irmscher, 262 F.2d 85, 88 (CCPA 1958) ("a basic reference and additional references having features somewhat analogous to those disclosed by appealed claims, which require material and radical modification in order to conform to appellant's claims, are not valid references unless they show an equivalent and operative combination which obviously could be substituted to meet the appealed claims by any skilled mechanic.").

The Examiner admits on pages 2-3 in the Final Office Action that Ji's reference does not teach the distinguishing features described above. The Examiner then attempts to remedy these deficiencies of Ji by modifying or combining Ji's device with Arnold's

device, despite that doing so requires changing a principle of operation of Ji's device. Ji's device operates by performing all virus screening below the application level. Ji explicitly states "[t]he present invention is particularly advantageous because all virus screening is performed below the application level." Ji, col. 6, lns. 11-13. (Emphasis added). Thus, performing all virus screening below the application level is a principle of operation of Ji's device that is required for Ji's device to provide what Ji states is a particularly important advantage of Ji's device.

Arnold's device includes a principle of operation in which data segregation is performed at the application level. See, Arnold, col. 7 ln. 67 through col. 8, ln. 60. Thus, Arnold performs virus screening at the application level. This teaching in Arnold is in direct conflict with the principle of operation of Ji requiring that all virus screening is performed below the application level since Arnold performs screening for a virus at the application level. A device resulting from the proposed combination of Ji and Arnold would function either below the application level or at the application level, but not both. Therefore, modifying or combining Ji's device with Arnold's device would necessarily change a principle of operation of either Ji's device, Arnold's device, or both devices. Therefore, under the above-noted well-settled law, Ji's device is neither modifiable nor combinable with Arnold's device, and the teachings of the references are not sufficient to render the claims prima facie obvious. Thus, the Examiner fails to establish a prima facie case of obviousness for independent claims 1, 5, and 11 in the Final Office Action.

As a result, the Examiner also fails to establish a *prima facie* case of obviousness in the Final Office Action for dependent claims 2-4, 6-10, and 12-20 because dependent claims 2-4, 6-10, and 12-20 are allowable for at least being dependent from their

respective allowable independent claims 1, 5, and 11, in addition to their own respective features. See, In Re Fine, 837 F.2d 1071 (Fed. Cir. 1988), and M.P.E.P. § 2143.03. Therefore, Appellants respectfully request that the Board reverse the Examiner's Final Rejection of claims 1-20 under 35 U.S.C. § 103(a) and forward this application for issue.

#### VIII. Conclusion

The subject matter of claims 1-20 is patentable over the cited references because the Examiner has failed to establish a *prima facie* case of obviousness. Therefore, Appellants respectfully request that the Board reverse the Examiner's final rejections of claims 1-20 under 35 U.S.C. § 103(a) and remand this application for issue.

Respectfully submitted,

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.

James J. Pohl

Attorney for Appellants Registration No. 60,724

6(30)03

Date:

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### IX. Claims Appendix (37 C.F.R. § 41.37(c)(1)(viii))

## 1. A method comprising:

receiving computer data from a first computer for transmission to a second computer via a network; and

screening the computer data for at least one virus before communicating the computer data to the second computer, wherein said screening comprises creating a model of the second computer, installing a program contained in the computer data on the model, and screening the model for the at least one virus.

- 2. The method of Claim 1, wherein the network comprises an IP network.
- 3. The method of Claim 1 further comprising:

if the at least one virus is detected, performing at least one of the following:

- (i) inhibiting communication of at least a portion of the computer data to the second computer;
- (ii) removing the at least one virus from the computer data prior to transferring the computer data to the second computer;
- (iii) communicating a message indicating that the at least one virus was detected to the second computer;
- (iv) communicating a message indicating that the at least one virus was detected to the first computer; and
- (v) writing data to a database indicating that the at least one virus was detected.

#### 4. The method of Claim 1 further comprising:

receiving computer data from the second computer for transmission to the first computer; and

screening the computer data received from the second computer for at least one virus before communicating the computer data received from the second computer to the first computer.

- 5. A virus screening device operative to be connected to a network and operative to screen computer data received from a first computer for at least one virus before communicating the computer data to a second computer, the virus screening device comprising:
- a model of the second computer, the model configured to have a program contained in said computer data installed thereon, and wherein said model is further configured to be screened for the at least one virus.
  - 6. The system of Claim 5, wherein the network comprises an IP network.
- 7. The system of Claim 5, wherein a configuration associated with the second computer routes communicated data to the virus screening device.
  - 8. The system of Claim 5, further comprising:

a third computer communicatively linked to the second computer via a local area network, wherein the virus screening device resides outside the local area network.

- 9. The system of Claim 5, wherein the computer data comprises an electronic mail message.
- 10. The system of Claim 5, wherein the computer data comprises data requested by the second computer from the first computer.

#### 11. A method comprising:

receiving screened data from a network-based virus screening device configured to screen data for at least one virus before communicating the data to a first computer, wherein said screening of data comprises creating a model of the first computer, installing on the model a program contained in the data, and screening the model for the at least one virus; and

forwarding the screened data to the first computer.

12. The method of Claim 11, further comprising: receiving a request for requested data from the first computer;

sending the request across a network to a second computer; and requesting that the requested data be returned via the network-based virus screening device.

- 13. The method of Claim 11, wherein the network comprises an IP network.
- 14. The method of Claim 11, wherein the network-based virus screening device resides within a wide area network, and wherein the method further comprises:

receiving across a local area network a request for requested data from the first computer;

sending the request across the wide area network to a second computer; and requesting that the requested data be returned via the network-based virus screening device.

15. The method of Claim 11, further comprising:

receiving a request for requested data from the first computer at a modem external to the first computer; and

initiating communication of the request from the modem across an IP network to a second computer.

- 16. The method of Claim 11, further comprising: forwarding a request to terminate a virus screening function of the network-based virus screening device.
  - 17. The method of Claim 11, further comprising:

configuring the network-based virus screening device to inhibit communication of at least a portion of the requested data.

18. The method of Claim 11, further comprising:

configuring the network-based virus screening device to inhibit communication of executables to the first computer.

19. The method of Claim 11, wherein the network-based virus screening device resides within a wide area network, and wherein the method further comprises:

configuring the network-based virus screening device to inhibit communication of executables to the first computer; and

configuring an electronic mail system associated with the first computer to route messages addressed to the first computer through the network-based virus screening device.

20. The method of Claim 11, wherein the first computer is communicatively coupled to a local area network and the network-based virus screening device resides outside a firewall associated with the local area network, and wherein the method further comprises:

configuring the network-based virus screening device to inhibit communication of executables to the first computer; and

configuring an electronic mail system associated with the first computer to route messages addressed to the first computer through the network-based virus screening device.

X. Evidence Appendix (37 C.F.R. § 41.37(c)(1)(ix))

None.

XI. Related Proceedings Appendix (37 C.F.R. § 41.37(c)(1)(x))

None.